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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

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NO. 79-1146

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JIMMY DELTON PETTY and
JOE MARTIN NUNEZ-QUINTELA,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

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# PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 4, 1979

TABLE OF CONTENTS


| | Page |
|---|---|
| List of Authorities---------- | iv |
| Opinions Below---------- | 2 |
| Jurisdiction---------- | 3 |
| Questions Presented---------- | 3 |
| 1. Whether a roving border patrolman can stop a motorist that chooses to deviate from our Federal highway systems and travel upon a roadway, albeit rough and lonely, merely because of the nature of the roadway itself, without the officer having observed any specific articulable fact which would lead to a conclusion that the motorist was engaged in the smuggling of illegal aliens or any other type of illegal activity.------ | 3 |
| Statutes Involved---------- | 5 |
| Statement of the Case-------- | 6 |

TABLE OF CONTENTS, Continued


| | Page |
|---|---|
| Reasons for Granting the Writ---------- | 13 |
| A. Importance of the Question---------- | 13 |
| B. Opinion Below Conflicts with Applicable Decisions of the Supreme Court------ | 21 |
| C. Conflict with Opinions of Other Circuits---------- | 31 |
| Conclusion---------- | 41 |




LIST OF AUTHORITIES


| Cases: | Page |
|---|---|
| Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)-------- | 22 |
| Almeida-Sanchez v. United States, 413 U.S. 266, 270, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973)---------- | 17 |
| Boyd v. United States, 116 U.S. 616, 635 (1886)----- | 21 |
| Brown v. State of Texas, ___ U.S. ___, 99 S.Ct. ___, 61 L.Ed.2d 357 (1979)---------- | 28, 29 |
| Camara v. Municipal Court, 387 U.S. 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967)---------- | 17 |
| Delaware v. Prouse, ___ U.S. ___, 59 L.Ed.2d 660, 99 S.Ct. 1391, 1396-97 (1979)---------- | 17, 25, 26, 28, 30 |
| Sibron v. New York, 392 U.S. 4073, 88 S.Ct. 1889, 1907, 20 L.Ed.2d 917 (1968)---------- | 33 |

Cases, Continued


| | Page |
|---|---|
| Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968)---------- | 22 |
| United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)---------- | 22, 23, 24, 25, 29, 30 |
| United States v. Carrizoza-Gaxiola, 528 F.2d 239 (Ninth Circuit, 1975)---- | 35, 36 |
| United States v. Cortez, 595 F.2d 505 (Ninth Circuit, 1979)---------- | 32, 33, 34, 36 |
| United States v. Frisbee, 550 F.2d 339 (1977)------ | 19 |
| United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L. Ed.2d 1116 (1976)-------- | 16, 27, 31 |
| Rules, Statutes and Miscellaneous: | |
| 28 U.S.C. §1254(1)---------- | 3 |
| United States Constitution, Amendment IV---------- | passim |




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JIMMY DELTON PETTY and
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Comes now Petitioners, Jimmy Delton Petty and Joe Martin Nunez-Quintela, and respectfully pray that the Honorable Supreme Court of the United States grant to Petitioners a Writ of Certiorari and review the Judgment and Opinion of the United States Court of Appeals for the

Fifth Circuit, reverse the lower Court's Opinion and render Judgment in accordance with the Judgment of the Trial Court in this cause.

## OPINIONS BELOW

Judge William Sessions, District Judge for the United States District Court, Western District of Texas, Pecos Division, in an unreported Opinion, entered an Order suppressing certain evidence which the government intended to introduce at the trial of Petitioners herein. The Court's Findings of Fact and Conclusions of Law are attached hereto as Exhibit "A". The government appealed the Trial Court's Order and on August 31, 1979, the United States Court of Appeals for the Fifth Circuit, in a published Opinion found at 601 F.2d 883, reversed



the ruling of the Trial Court. A copy of this Opinion and the Court's Judgment Overruling Motion for Rehearing En Banc is attached to this Petition as Exhibit "B".

## JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 23, 1979, a Motion for Panel Rehearing was overruled on September 21, 1979, and a Petition for Rehearing En Banc was denied on November 14, 1979. The Petitioners herein invoke the jurisdiction of this Honorable Court pursuant to 28 U.S.C. §1254(1):

> "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

## QUESTIONS PRESENTED

By reversing the Order of Suppres-

sion of the Trial Court, the United States Court of Appeals for the Fifth Circuit in effect has suspended all Fourth Amendment rights and privileges to those motorists that choose to travel on public roadways which deviate from the national highway system in areas near the border, merely because patrolmen of the Immigration and Naturalization Service consider the roadway itself of being suspect or capable of transporting illegal activities thereon. The threshold question presented by this Petition is:

1. Whether a roving border patrolman can stop a motorist that chooses to deviate from our Federal highway systems and travel upon a roadway, albeit rough and lonely, merely because of the



nature of the roadway itself, without the officer having observed any specific articulable fact which would lead to a conclusion that the motorist was engaged in the smuggling of illegal aliens or any other type of illegal activity.

## STATUTES INVOLVED

Fourth Amendment to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

21 U.S.C. §841(a)(1):

"to manufacture, distribute, or dispense, or possess with intent

to manufacture, distribute, or dispense, a controlled substance;"

STATEMENT OF THE CASE

Petitioners Jimmy Delton Petty and Joe Martin Nunez-Quintela were indicted in the United States District Court for the Western District of Texas, Pecos Division, on July 17, 1978, for a violation of 21 U.S.C. §841(a)(1), to-wit: knowingly and intentionally possessing with intent to distribute a quantity of marihuana, a Schedule I controlled substance.

Petitioners thereafter filed a Motion to Suppress Evidence on the ground that the stop by the roving border patrol agent was not founded upon specific articulable facts, together with rational inferences from these facts, that



would reasonably lend suspicion that the vehicle in which they were riding contained illegal aliens. On the 12th day of September, 1978, District Judge William Sessions ruled in favor of Petitioners' Motion and entered an Order suppressing the contraband and any statements made by the Defendants pursuant to the illegal stop. The government appealed and subsequently, on August 23, 1979, the Fifth Circuit issued an Opinion and entered Judgment reversing the Judgment of the Trial Court. Petitioners herein filed Motions for Panel Rehearing and En Banc Rehearing which were both denied and hence, this Petition for Certiorari.

The facts of the case are primarily undisputed. At the time Petitioners

were stopped pursuant to a roving border patrol check, they were traveling on a road located in Southwest Texas known as Bullis Gap Road.

Bullis Gap Road is a 63 mile stretch of unpaved, but public, road which connects on the Southwest end to U.S. 385 and on the Northeast end to U.S. 90. Both U.S. 385 and U.S. 90 are major arteries of travel in the Southwestern portion of Texas. U.S. 385 connects with the Eastern entrance to Big Bend National Park which lies adjacent to Mexico. Bullis Gap Road is unpaved and traverses through desolate and rough terrain. The testimony reflected that at the Northeast end the residents along the road generally traveled the road in pick-up trucks or four-wheel



drive vehicles, but the initial twelve to fourteen miles of the Southwest end of the road was in good condition and maintained regularly. From the evidence, it is evident that the Petitioners entered the road at the Southwest junction of U.S. 385 and were then stopped at the Northeast end of the road approximately one mile from the junction with U.S. 90.

The officer who was in charge of the interception was a border patrolman by the name of Pagitt. Officer Pagitt had lived in Sanderson, Texas, located near the Southeast end of Bullis Gap Road for eleven years. He knew the resident owners of ranches located on the Southern end of the Road and knew what type of vehicles they drove. However, he did not know the resident

owners that lived on the North end of the road, and he did not know the non-resident owners who owned property along the road but lived elsewhere.

Border Patrol Officer Pagitt, over Petitioners' objections, testified that he had heard from a superior that on two previous occasions Bullis Gap Road had been used to circumvent a permanent checkpoint which was set up by the Immigration and Naturalization Service on U.S. 385. Officer Pagitt asked residents that lived along the road to telephone him if they saw any strangers using the road in question.

On the morning of June 21, 1978, Officer Pagitt received a telephone call from a friend who lived near Bullis Gap Road and was informed that two vehicles



with one person in each vehicle were proceeding North on Bullis Gap Road. Armed with this information some two hours prior to ever seeing Petitioners' vehicles, Officer Pagitt made the decision to stop the vehicles in question. He enlisted the help of two fellow border patrolmen and a patrolman from the Texas Department of Public Safety. Expecting to intercept two passenger cars, the officers took a position on the Northeast end of Bullis Gap Road approximately 7/10ths of a mile South of U.S. Highway 90 and stopped the vehicle containing the Petitioners. Officer Pagitt testified that he made his decision to stop the vehicles headed Northeast on Bullis Gap Road approximately two hours prior to his ever seeing the vehicle in which

Petitioners were traveling. He further testified that he did not know whether the suspected vehicle had come from Alpine, Texas, from Marathon, Texas, (both towns in opposite directions from the border), or from the border area. The only thing he knew was two cars were headed North on Bullis Gap Road.

Officer Pagitt and his fellow officers stopped the automobile driven by Petitioner Petty. The point of the stop was over 95 miles from the border of Mexico.

The permanent checkpoint on U.S. 385 which the officer felt that the passenger cars headed North on Bullis Gap Road were seeking to circumvent apprehended 302 illegal aliens in the year 1977.



## REASONS FOR GRANTING THE WRIT

### A.

### IMPORTANCE OF THE QUESTION

The exercise of unrestrained and arbitrary discretion by an officer in the field which infringes upon a citizen's Fourth Amendment guarantees is hardly a stranger to this Honorable Court. Each term the Court reiterates the extreme gravity of danger involved by insisting that probable cause or reasonable suspicion exist prior to an officer infringing upon the freedom of movement of a citizen.

Perhaps because of the serious illegal alien problem many of the Fourth Amendment questions facing contemporary federal jurists involve the activities of Immigration and Naturalization Service

border patrolmen performing what has commonly become termed as "roving border stops." The instant case involves such a stop.

The government is insisting that Officer Pagitt's stopping of Petitioners' vehicle was based upon "reasonable suspicion". If the lower Court's Opinion is allowed to stand, a serious infringement to each citizen's Fourth Amendment protection will have occurred.

The articulable facts upon which Officer Pagitt based his "reasonable suspicion" consisted solely upon his knowledge of the physical characteristics of the roadway and his knowledge of some of the residents living adjacent to the roadway. His decision to stop Petitioners some two hours prior



to his ever seeing them or the vehicle in which they were riding was because he considered them to be strangers to the area and their automobile suspicious to the roadway upon which it was traveling.

Since a permanent checkpoint on U.S. 385 (a highway leading to the Big Bend National Park upon which hundreds of thousands of tourists travel annually) had netted three hundred and two illegal aliens, and Officer Pagitt had heard Bullis Gap Road had been used on two occasions by smugglers seeking to circumvent the checkpoint, he assumed that any person driving a vehicle "strange" to the area was a smuggler. (Compare the statistics of the three hundred and two illegal aliens apprehended to the

statistics of the San Clemente check-point discussed in United States v. Martinez-Fuerte, infra, where seventeen thousand aliens were apprehended in 1973.)

Since Officer Pagitt did not know that the cars had come from the border and made his decision to stop the two cars traveling North on Bullis Gap Road some two hours prior to his ever seeing the car, the record is completely devoid of any evidence of any individualized suspicion suspecting that the Petitioners were guilty of any criminal activity. Such standardless and unconstrained discretion is the evil which this Court spoke of in previous cases where it emphatically insisted that the discretion of the officer in the field be constrained, at least to some extent. See



Almeida-Sanchez v. United States, 413 U.S. 266, 270; 93 S.Ct. 2535 (1973); 37 L.Ed.2d 596; Camara v. Municipal Court, 387 U.S. 528; 87 S.Ct. 1727 (1967); 18 L.Ed.2d 930; and Delaware v. Prouse, infra. In Delaware v. Prouse, the Court insisted on a quantum of individualized suspicion by saying:

> "To insist upon neither an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches. . .' "

Simply stated, this Court has recognized the fact that an individual does not forego Fourth Amendment protection when he travels in his automo-

bile and, in turn, has insisted that the law enforcement officer in the field observe articulable facts indicating criminal activity prior to his restraining a citizen of his right of privacy and freedom of movement.

In this case the government is seeking, and the lower Court has allowed, carte blanch authority to stop all vehicles traveling on those roads which connect to the major highways of the United States that lead to the border without ever seeing the vehicle or the individual suspected, merely because of the characteristics and history of the road itself. Certainly such unfettered action on the part of governmental agents cannot be constitutionally permitted. In the instant case the statis-



tics themselves show the total unreasonableness of the government's position. In 1975, approximately 332,000 people visited the Big Bend National Park. See United States v. Frisbee, 550 F.2d 339. It is reasonable to assume that the figures have increased since that time. U.S. 385 is one of the two major arteries leading to the Big Bend National Park and in the year of 1977 the checkpoint located on U.S. 385 only netted three hundred and two illegal aliens; and during that period of time, Officer Pagitt's superior had heard that on two occasions the Bullis Gap Road had been used by alien smugglers seeking to circumvent the checkpoint. Certainly the government's position when it seeks authority to stop all passenger cars

traveling on Bullis Gap Road is constitutionally impermissible reasoning.

Petitioners strongly urge that should the lower Court's Opinion be allowed to stand, a motorist's Fourth Amendment protection will be eliminated for all of those motorists that choose a route not deemed standard in the minds of the border patrol. Merely because a person should choose a route which is out of the way, rough, and lonely, does not necessarily imply that the individual is involved in illegal activity. Certainly the Fourth Amendment dictates that some quantum of "observed individualized suspicion" be involved prior to the stopping and restraining of a motorist by an officer in the field.



Petitioners would call to the attention of this Court the applicable quotation from the case of Boyd v. United States, 116 U.S. 616, 635 (1886):

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and constitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

B.

OPINION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THE SUPREME COURT

The landmark case governing roving

border patrol stops is United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574 (1975), 45 L.Ed.2d 607, which dealt with stops to investigate the presence of illegal immigrants. In reliance on Terry v. Ohio, 392 U.S. 1, 88S.Ct. 1868 (1968), 20 L.Ed.2d 889, and Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921 (1972), 32 L.Ed.2d 612, the Supreme Court held that, even in the absence of probable cause to search a vehicle or arrest its occupants, "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion." 422 U.S. at 881, 95 S.Ct. at 2580. The standard for conduct-



ing such a stop is less stringent than "probable cause to believe the suspects guilty of a crime." Id. at 880, 95 S.Ct. at 2580. Rather, officers on roving patrol may stop vehicles "if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." Id. at 884, 95 S.Ct. at 2582.

While the Court's theory below recognizes that this Court in Brignoni-Ponce does allow border patrol officers to evaluable the totality of the circumstances in light of their experiences and to draw reasonable inferences therefrom, the Court's Opinion ignores the Supreme Court's directive in Brignoni-

Ponce that the factors to be considered, giving rise to reasonable suspicion are all necessarily based upon personal observation by the officers of the suspected person or the suspected vehicle.

Petitioners do not deny that this Court in Brignoni-Ponce specifically indicated that the officers could consider the characteristics of the area in which they encounter a vehicle, but in listing the factors which a border patrol officer could consider, the remainder of the factors necessarily involve personal observation of specific facts directed toward the specific suspect or vehicle involved. In pronouncing the necessity for individualized suspicion, this Court held as follows:



> ". . ., [We] hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion." (Emphasis added.)

The holding of the Fifth Cirucit in the instant case is in direct conflict with the principles that this Court established in Brignoni-Ponce in that Officer Pagitt made up his mind to stop Petitioners' vehicle two hours prior to ever seeing the vehicle in question. Hence, his observations could not have led him to reasonably suspect that the particular vehicle may contain illegal aliens, or be involved in any other type of criminal activity.

In Delaware v. Prouse, ___U.S. ____, 99 S.Ct. 1391, 1396-97, 59 L.Ed.2d 660

(1979), this Court has recently recognized the extreme danger in allowing governmental agents to stop those individuals operating or traveling in an automobile on anything less than observable actions creating suspicion, and further insisted that prior to a motorist's Fourth Amendment rights being violated, the officer have an appropriate factual basis for suspicion directed at a particular automobile. Anything short thereof in the words of this Court

> ". . .would invite intrusions upon constitutionally guaranteed rights based upon nothing more substantial than inarticulate hunches." Id.at 672.

In Prouse this Court recognized that the stopping of a vehicle on anything less than reasonable suspicion based upon observable facts was the kind of standard-



less and unconstrained discretion which the Court has observed in previous cases when it insisted that the discretion of the officer in the field be circumscribed to some extent.

This Court further explained the theory behind requiring a quantum of at least reasonable suspicion for roving patrol stops in the case of United States v. Martinez-Fuerte, 428 U.S. 543, 96 S. Ct. 3074, 49 L.Ed.2d 1116. It is interesting to note that the government's argument for eliminating the reasonable suspicion for permanent checkpoints is that there are too may vehicles to personally observe, thus rendering reasonable suspicion of each vehicle an impossibility. In the instant case the government's argument is that since the

desolate road is so seldom used and has been used two times in the past for smuggling, then every vehicle traveling thereon must be operated by a smuggler. The lower Court's Opinion is likewise in direct conflict with the principles set forth in Delaware v. Prouse, supra, and United States v. Martinez-Fuerte, supra.

Such a contention by the government is similar to the position urged by the State of Texas in the recent case of Brown v. State of Texas, ____ U.S.____, 99 S.Ct. ___, 61 L.Ed.2d 357 (1979) wherein it was urged that since the motorist turned into an alley in a "high crime" area, thus the motorist must have been involved in some type of suspicious activity. This Court, in



rejecting such a contention and relying upon Brignoni-Ponce and Delaware v. Prouse, reiterated emphatically that officers must have reasonable suspicion based on objective facts that the particular individual is involved in criminal activity. Likewise, the lower Court's decision is in direct conflict with the principles announced by this Court in Brown v. Texas.

Perhaps equally as important as the obvious conflict between the constitutional guidelines as announced by this Court and the lower Court's Opinion is the fact that the lower Court completely ignored statements heretofore made by this Court concerning the type of roadway upon which a person retains his Fourth Amendment guarantees. In

Brignoni-Ponce, this Court struck down the government's contention that a border patrol officer could stop motorists at random for questioning day or night anywhere within 100 air miles of the 2,000 mile border, on a city street, or busy highway, or a desert road, without any reason to suspect that the motorist had violated the law. Subsequently, in Delaware v. Prouse, supra, this Court reiterated the fact that the Fourth Amendment guarantee extends to motorists using any type of roadways by saying:

> "In this regard, we note that Brignoni-Ponce was not limited to roving border patrol stops on limited access roads, but applied to any roving patrol stops by border patrol agents on any type of roadway on less than reasonable suspicion. (Emphasis added.) Id at 669, 670.



Contrary to the Opinion of the Fifth Circuit in this case, this Court has steadfastly refused to limit the Fourth Amendment rights of a citizen to any particular type of raodway. Except in the case of permanent checkpoints, United States v. Martinez-Fuerte, the standard has been and well should be that the officer have a "reasonable suspicion" of illegal activity prior to the stopping of a motorist, whether the motorist be traveling on an interstate turnpike or a lonely desert road.

C.

CONFLICT WITH OPINIONS OF OTHER CIRCUITS

Petitioners could cite to the Court scores of cases from other circuits, particularly those circuits having common

borders with Mexico, that conflict with the instant case. The other circuits have been strict in requiring a quantum of individualized suspicion based upon specifically observable articulable facts prior to there being justification for the stopping of a motorist by a law enforcement official. The most obvious conflicting opinion involving a suspicious vehicle on a seldom used route of travel can be found in the case of United States v. Cortez, 595 F.2d. 505 (Ninth Circuit, 1979). As pointed out in the dissenting opinion, the road involved, although paved, was similar to the Bullis Gap Road in this case. Route 86 also was a less traveled road that wandered throughout desolate desert terrain and mountain ranges in Arizona.



It was also a road suspected by border patrol officers as being used for illegal alien trafficking. One of the officers in Cortez also testified that he knew all of the local residents and their vehicles and that the car the defendant was riding in was suspicious. The facts as set forth by the dissent are strikingly similar to the instant case. The majority opinion in Cortez held that there must be individualized suspicion based upon fact or facts which focus the suspicion on the individual or particular vehicle which is stopped. The Court in Cortez quotes from Justice Harlan's concurring opinion in Sibron v. New York, 392 U.S. 40 p. 73, 88 S.Ct. 1889, 1907, 20 L.Ed.2d 917 (1968);

> "There must be something at least in the activities of the person being observed or his surroundings that affirmatively suggests particular criminal activity. . ."(Emphasis added.)
>
> "It is not enough that the officer has a hunch that criminal activity is afoot."

In Cortez the Court of Appeals for the Ninth Circuit correctly held that under the circumstances, even though the officers had a hunch to believe that a professional alien smuggler was operating on a particular weekend and that the defendant's vehicle was within the class of vehicles usually used in the smuggling operation fitting the modus operendi of the operation, there were not sufficient articulable facts leading to the conclusion that the vehicle the defendant was driving was involved in the smuggling operation. The Cortez facts and the



facts in the instant case are also similar in that the officers involved made up their minds to stop the particular vehicle within some ninety minutes prior to the actual stopping of the vehicle.

The lower Court's Opinion in the instant case is also conflicting with the Ninth Circuit case of United States v. Carrizoza-Gaxiola, 528 F.2d 239 (Ninth Circuit, 1975). In Carrizoza-Gaxiola, the officers stopped a vehicle on a road used for the transportation of stolen cars between Phoenix, Tucson, and Mexico, the suspected vehicle on a road used by smugglers fit the profile constructed by the officers from specific articulable facts, but the Court struck down the stopping of the defendant in

that case, saying:

> "founded suspicion requires some reasonable ground for singling out the person stopped as the one who was involved."

Both Cortez and Carrizoza-Gaxiola involve what the officers termed as a suspicious vehicle traveling on roadways commonly used for illegal activities, which is the same contention of the government in this case, and both cases in the Ninth Circuit reach an opposite result. However, it should be pointed out that both cases can be distinguished in Petitioners' favor in that both motorists were driving suspected vehicles in high crime areas. In the instant case, can the government be heard to claim that Bullis Gap Road was a high crime area simply because



Officer Pagitt had heard the road had been used two times for smuggling purposes during the eleven year period that he had lived in the area. With at least one-third of a million people visiting the area in question annually, and considering the wilderness nature of the Big Bend area itself, certainly it is not inconceivable that a motorist would venture down the public road known as Bullis Gap Road simply to view the rugged country. Or, perhaps a motorist entering from the U.S. 385 end might wish to take a scenic shortcut to the town of Sanderson, which is located on the U.S. 90 end of the road.

Petitioners feel that it would be fitting to include the Honorable William S. Sessions' statements from the bench

at the conclusion of the suppression hearing concerning the lack of sufficient articulable facts to create reasonable suspicion in the mind of Officer Pagitt.

> "The Court does not mean to be flippant at all, Mr. Mesa, but mad dogs and Englishmen go out in the noonday sun. There is no question in my mind that there might be some people who would try to take any road that was available just to see what was at the other end or to go across it. I simply do not believe from what the Government has presented that there are sufficient articulable facts in which one could reasonably stop the automobile. The Court believes that there was obviously good police work; obviously Mr. Pagitt had a good surmise; obviously they were very alert; and obviously they were very right. And there is no question but what you did, in fact, intercept two traffickers in marihuana. And it is unfortunate that, in fact, there were not other articulable facts that would support the stop. The stop simply was not proper, and simply not based upon law, and for that reason the Court will grant the motion to suppress both the items that were seized and any statements that were made by the Defendants subsequent to the stop that were not Miranda cleared statements and properly made subsequent to a warning."



Big Bend National Park is out nation's largest national park in terms of area. The park itself consists of a vast sprawling desert region with approximately three mountain ranges widely separated. The road system within the park contains as many unpaved roads as it does paved roads. The paved roads merely are major arteries that lead the tourists from one major attraction to another. The terrain over which Bullis Gap Road traverses has the same topographical factors. As noted by the

Trial Judge, it is not unlikely but highly probable, due to the nature of the Big Bend area itself, that tourists and motorists travel Bullis Gap Road merely to see what is on the other end.

From the Ninth Circuit cases cited herein, it is clear that had Petitioners been stopped in the desert areas of California or Arizona, a different result would have occurred.

Merely because an automobile is "strange" to the area does not mean the driver is committing illegal activities. The lower Court's theory that there was "reasonable suspicion" because of the fact that a car was strange to the area and traveling upon a road too rough for normal driving simply cannot stand. This Court should grant a Writ of



Certiorari to provide uniformity of law in accordance with the opinions of the Ninth Circuit and of this Honorable Court wherein it has been insisted that there be a quantum of individualized suspicion directed toward a particular person or vehicle prior to the officer having the right to stop said vehicle.

## CONCLUSION

Petitioners pray that this Court grant a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Fifth Circuit and upon review hereof, Petitioners pray that the lower Court's Opinion be reversed and judgment entered in accord-

ance with the well-founded constitutional provisions as discussed herein.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS



EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | No. P-78-CR-69(1) |
| | ) | |
| JIMMY DELTON PETTY | ) | |
| JOE MARTIN QUINTELA-NUNEZ | ) | |

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

On the 12th day of September, 1978, the above styled and numbered cause was regularly called on the docket of this Court for hearing on Defendants' Motion to Suppress the Evidence herein. Thereafter, the Court having duly considered the evidence and the summation of counsel and the applicable law, hereby makes its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about June 21, 1978, at approximately 10:00 A.M., United States

Border Patrol Officer A. J. Pagitt received information from a confidential informant that two unfamiliar vehicles were traveling north from Highway 385 on a dirt road known as Bullis Gap Road. Bullis Gap Road is an unpaved road approximately 60 miles in length, which intersects Highway 385 and Highway 90, approximately five miles south of Marathon, Texas.

2. Bullis Gap Road runs in a quarter-circle manner from Highway 385 northeast to Highway 90, and is frequently used by local ranchers and hunters.

3. Several weeks prior to the incident in question, United States Border Patrol Officer Hugh Rudston had received information that Bullis Gap Road was being used to circumvent the Border Patrol checkpoint on Highway 385.



Thereafter, local ranchers were asked to report suspicious vehicles on Bullis Gap Road.

4. On or about June 21, 1978, a confidential informant telephoned United States Border Patrol Officer Hugh Rudston and informed him that two vehicles were on Bullis Gap Road, and that one person was in each vehicle. The informant said that the vehicles were dark blue and black, and were traveling approximately 100 yards apart, towards Highway 90.

5. Upon receipt of the information from the confidential informant, Officer Pagitt called United States Border Patrol Officers Fisher and Munoz, and said officers situated themselves near the intersection of Bullis Gap Road and Highway 385.

6. At approximately 11:25 A.M., the officers spotted a light blue vehicle containing two persons on Bullis Gap Road. No other vehicle followed. The light blue vehicle was stopped and United States Border Patrol Officers ascertained that the driver, JIMMY DELTON PETTY, was the owner of the vehicle. The passenger was identified as Defendant, JOE MARTIN QUINTELA-NUNEZ.

7. When no other vehicle appeared, Officer Pagitt went south some four miles but saw no dust or other indication of another vehicle.

8. Officer Fisher asked both Defendants for their identification, and then asked Defendant, JIMMY DELTON PETTY, for a key to the trunk of the vehicle. Defendant, JIMMY DELTON PETTY, responded that he did not have a key.



9. Officer Pagitt asked where the Defendants were coming from, to which the Defendants responded, "Big Bend National Park." Defendants said that they had seen no other car on Bullis Gap Road.

10. The officers noted that a jack, spare tire, and CB radio had been placed in the back seat of the vehicle, and Officer Pagitt asked the Defendants why the spare tire was located in the backseat. Defendant PETTY replied that the vehicle was his wife's, and that the tire was in the backseat so that it could be inflated.

CONCLUSIONS OF LAW

1. The stop of the Defendants' vehicle by the United States Border Patrol Officers was not justified by "rational inferences," nor was it drawn

from "specific articulable facts," which warranted the suspicion that said vehicles contained illegal aliens. United States v. Brignoni-Ponce, 422 U.S. 873, 884, 95 S.Ct. 2574, 45 L.Ed. 607 (1975).

2. The totality of the circumstances herein do not indicate that the agents' suspicions were reasonable and well-founded, and there were insufficient grounds for reasonable suspicion to justify the initial stop herein. United States v. George, 567 F.2d 643 (5th Cir. 1978); United States v. Frisbie, 550 F.2d 335 (5th Cir. 1977).

October 11, 1978

/s/ WILLIAM S. SESSIONS
WILLIAM S. SESSIONS
United States District Judge



UNITED STATES OF AMERICA,

PLAINTIFF-APPELLANT,

v.

JIMMY DELTON PETTY AND JOE MARTIN NUNEZ-QUINTELA,

DEFENDANTS-APPELLEES.

NO. 78-3276

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

AUGUST 31, 1979.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

Before WISDOM, AINSWORTH and RONEY, Circuit Judges.

AINSWORTH, Circuit Judge:

This appeal involves review of the district court's order granting appellees' motion to suppress evidence derived from a search of the car in which they were riding. Appellees Jimmy Petty and Joe Nunez-Quintela were indicted for possession of a quantity

of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), after United States Border Patrol officers discovered approximately 190 pounds of marijuana in their car's trunk. Prior to trial appellees moved to suppress this evidence claiming that the stop and subsequent search of the car which led to discovery of the marijuana were unsupported by reasonable suspicion and probable cause and, consequently, violative of the Fourth Amendment. The district court granted the motion, finding that the Border Patrol lacked reasonable suspicion for the initial stop of the car, and the Government appeals. We reverse.

FACTS:

In large measure this case is about Bullis Gap Road, a 63-mile length of unpaved, public



road running northeast through ranch country, canyons, rimrock and a small mountain range between United States Highways 385 and 90 in an area just north of Big Bend National Park in southwestern Texas. In this area, Highway 385, a paved highway, runs in a north-south direction from the eastern entrance of Big Bend National Park to Fort Stockton, Texas, passing through Marathon, Texas where it intersects Highway 90, another paved highway. Highway 90 runs east and west across Texas forming a right angle with Highway 385 at Marathon. Bullis Gap Road joins Highway 385 roughly 30 miles north of the Mexican border and 32 miles south

of Marathon and intersects Highway 90 roughly 40 miles east of Marathon and 15 miles west of Sanderson, Texas, tracing a rough quarter circle between the two paved roads. No other roads intersect or give access to Bullis Gap Road.

Uncontradicted testimony at the suppression hearing established that, except for the southernmost 12 to 14 miles, Bullis Gap Road, apart from being unpaved, is in terribly bad condition and in places "nearly impassable."[1] There are many low water crossings and large sandbars where water has washed sand across the road. There are no bridges. In addition, there are numerous deep holes in the road. Be-

1. Tr., p. 11.



cause of the extremely difficult terrain, people living there generally drive pick-up trucks or vehicles with four-wheel drive; conventional passenger cars are rarely seen on the road. It takes a four-wheel drive vehicle approximately two hours and forty minutes to drive the full length of the road at a maximum speed of about 30 miles per hour. However, by using paved Highways 385 and 90 one can go from the road's intersection with one highway to the road's intersection with the other in about an hour and a half. Because the northern three quarters of the road are so bad, the few residents living along the road rarely use the road to reach Highway 90, preferring to drive south to Highway 385 and then take Highway 385 to Marathon. There are no signs or markings

at the road's southern end that indicate that it leads to Highway 90. The distance from the road's intersection with Highway 385 to Fort Stockton along Highway 385 is approximately 90 miles; by taking Bullis Gap Road to Highway 90, however, a traveler would add roughly 50 miles to the trip, making a total of 140 miles.

Throughout most of the year the road is very lightly traveled, used principally by the eight or so families who live there and a few absentee owners who visit occasionally. The road does receive relatively more use, however, during the hunting season which runs for about a week after Thanksgiving in November or December. The stop in this case occurred in June, not in the hunting season. Border Patrol officers



are familiar with most of the residents along the road and their vehicles.

As stated above, the intersection of Bullis Gap Road and Highway 385 lies 30 miles north of the Mexican border. The nearest, manned port of entry on the border is at Presidio, Texas, located about 80 miles west of Big Bend National Park. In the vicinity of the Park there are eight unmanned ports of entry and numerous spots where the Rio Grande is easily forded. The events in this case took place in June when the river is passable. In January 1965 the Border Patrol established a checkpoint on Highway 385 five miles south of Marathon. During the 1977 fiscal year 302 aliens who entered the United States illegally were apprehended at this checkpoint.

Several weeks before June 21, 1978, Hugh Rushton, the Assistant Chief of the Border Patrol stationed in Marfa, Texas, notified Border Patrol Officer Albert Pagitt, who was stationed in Sanderson, that he had on two different occasions received information that Bullis Gap Road was being used by motorists to circumvent the checkpoint on Highway 385. Accordingly, Officer Pagitt asked various people living along the road if they had seen any strangers and requested that they telephone him if they saw any strangers or suspicious vehicles on the road.

On the morning of June 21, Pagitt received a telephone call from a friend who lived near Bullis Gap Road and who had helped him on previous occasions to the effect that there were two cars,



one light blue and the other dark blue or black, driving north on Bullis Gap Road with one person in each car. The cars were traveling about 100 yards apart and from their location at the time of the call Pagitt estimated that they would reach Highway 90 within an hour and a quarter to an hour and a half. He immediately began preparation to stop the two cars when they reached Highway 90, enlisting the aid of Officers Forrest Fisher and Robert Munoz of the Border Patrol and Officers Charles Lowrance and Randy Mills of the Texas Department of Public Safety.

Fisher and Munoz took up a position on Bullis Gap Road about .7 of a mile south of Highway 90, while Pagitt and the two DPS officers established an observation point on the road approxi-

mately 1.4 miles south of Highway 90. When a light blue car with two passengers passed the observation position, Pagitt directed Fisher by radio to stop it and then drove south for roughly four miles in search of the second car. Although Pagitt did not see another car at that time, the dark blue car was eventually located about 20 miles south of Highway 90 where it was stuck in a low water crossing.

At the time of the stop, however, not having seen a second car or dust from a car, Pagitt returned to where Fisher and Munoz had stopped the light blue car and its occupants, appellees Petty and Nunez-Quintela. After Fisher reported that appellees had no key to the car's trunk, Pagitt had a conversation with Petty who had then gotten out of the car. In response to Pagitt's



questions, Petty stated that they were coming from the area of Big Bend National Park and that they were going to Fort Stockton. Petty said that there was no other car with him and that he had seen no other car on the road while he had been on it. Petty was talking very rapidly, while Nunez sat in the car saying nothing and looking straight ahead.

In plain view on the car's back seat were an inflated spare tire, a jack, a lug wrench and a CB radio which was not operational. There was a functional CB radio in the front seat. The officers noticed no camping equipment in the car. When asked about the spare tire, Petty mentioned something about a flat tire and said that he had borrowed the spare tire and not put it back in the trunk. He explained that he had

gotten the car from his wife and did not have the trunk keys. Pagitt testified at the hearing that, after a second inquiry about the keys, Petty "told us that there was nothing in the trunk, and said go ahead and break it open if we wanted to but there was nothing in it."[2] There is no evidence in the record to contradict Pagitt's testimony that Petty voluntarily offered to permit the officers to break open the trunk in order to allay suspicion and verify that it was empty.

Although pagitt had the necessary tools to force open the trunk, he declined to use them as he "didn't want to just break the man's trunk open when I could go through the back seat without tearing anything up."[3] Therefore, when Petty said he was going to

2. Tr., p. 31.
3. Ibid.



Fort Stockton by way of Sanderson, Pagitt suggested, "Well, let's--how about going on into my office and we'll look, go through the back seat."[4] The Border Patrol's Sanderson office is only 100 yards past the road to Fort Stockton on Highway 90. Petty and Nunez-Quintela, who were not under arrest at this time, then drove their car to Sanderson followed by the Border Patrol and DPS officers in other cars. On reaching Sanderson, Pagitt and DPS Officer Mills removed the back seat of the Petty car and found the marijuana in the trunk. The officers then read Petty and Nunez-Quintela their rights and called the Drug Enforcement Administration.

DISCUSSION:

The proper analysis in this case

4. Tr.,p. 32.

requires a two-step inquiry: first, to determine whether there was reasonable suspicion for the initial stop of appellees' car, and second, to determine whether the subsequent search was justified either by appellees' consent or by probable cause.

A. THE STOP:

[1] The landmark case governing roving patrol stops is United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), which dealt with stops to investigate the presence of illegal immigrants. In reliance on Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921, 32 L.Ed.2d 612 (1972), the Supreme Court held that, even in the



absence of probable cause to search a vehicle or arrest its occupants, "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion." 422 U.S. at 881, 95 S.Ct. at 2580. The standard for conducting such a stop is less stringent than "probable cause to believe the suspects guilty of a crime." Id. at 880, 95 S.Ct. at 2580. Rather officers on roving patrol may stop vehicles "if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." Id. at 884,

95 S.Ct. at 2582. Beyond limited questioning regarding the suspicious circumstances, "any further detention or search must be based on consent or probable cause." Id. at 882, 95 S.Ct. at 2580.

By conditioning stops on the existence of reasonable suspicion motorists are protected from "potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers." Id. at 882, 95 S.Ct. at 2581. See also Delaware v. Prouse, _____ U.S. _____, 99 S.Ct. 1391, 1396-97, 59 L.Ed.2d 660 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). The Court in Brignoni-Ponce articulated a number of factors that officers may



consider in determining the existence of reasonable suspicion. Among them are "the characteristics of the area in which they encounter a vehicle, [i]ts proximity to the border, the usual patterns of traffic on the particular road, . . . previous experience with alien traffic. . ., recent illegal border crossings in the area, [t]he driver's behavior . . ., obvious attempts to evade officers . . ., [a]spects of the vehicle itself, . . ., an extraordinary number of passengers, or . . . persons trying to hide." 422 U.S. at 884-85, 95 S.Ct. at 2582 (citations omitted). In evaluating the inferences to be drawn from observable facts, "the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling." Ibid.

Although we have in recent years had occasion to apply the Brignoni-Ponce test in a wide variety of factual situations, including many cases from the vicinity of Big Bend National Park, e.g., United States v. Carroll, 5 Cir., 1979, 591 F.2d 1132; United States v. Saenz, 5 Cir., 1978, 578 F.2d 643, cert. denied, _____ U.S. _____, 99 S.Ct. 850, 59 L.Ed. 2d 42 (1979); United States v. Villarreal, 5 Cir., 1978, 565 F.2d 932, cert. denied, ___ U.S. _____, 99 S.Ct. 92, 58 L.Ed.2d 116 (1978), it is the nature of this area of the law that "[e]ach case must turn on the totality of the particular circumstances." United States v. Brignoni-Ponce, 422 U.S. at 885 n. 10, 95 S.Ct. at 2582; United States v. Rivera, 5 Cir. 1979, 595 F.2d 1095, 1098; United States v. Villarreal, supra, 565 F.2d at 937.



We begin our evaluation of the facts in this case by distinguishing it from the two cases on which appellees principally rely, United States v. Frisbie, 5 Cir., 1977, 550 F.2d 335, and United States v. George, 5 Cir., 1978, 567 F.2d 643. Frisbie and George both involved stops on Texas State Highway 118 which runs north from the western end of Big Bend National Park to Alpine, Texas.

In Frisbie the Border Patrol detected three vehicles headed north on Highway 118 between 6:30 a.m. and 7 a.m. and stopped all three, discovering marijuana in the third. We listed the suspicious circumstances advanced by the Government as follows:

> [t]he direction the vehicle was traveling, the liklihood that the vehicle was coming from an

unpatrolled river area, the difficulty the driver had in stopping the vehicle, the sparsely populated area where the stop occurred, [the officers'] knowledge that local traffic did not normally travel the roads in question at such early hours of the morning and that the route in question was frequently traveled by persons transporting illegal aliens and contraband, with such activity taking place primarily in the late evening and early morning hours.

550 F.2d at 337.

Given that Highway 118 is one of the two main roads leading away from Big Bend National Park, we concluded that "approval of a stop of this nature, founded upon dubious 'suspi-



cious' circumstances of such slight import would result in subjecting the thousands of tourists visiting the area to unreasonable detention whenever they travel at hours when certain routes are less frequented." Id. at 338. Similarly, in George, Border Patrol officers stopped a Buick Electra with Georgia license plates traveling north at 1:45 a.m. when they recognized neither the car nor its solitary occupant and saw no camping equipment in the car. 567 F.2d at 644-45.

[2] The major and, in our view, critical distinction between Frisbie and George and the instant case is the great difference between Highway 118, a paved highway and one of the major arteries leading to Big Bend National

Park, and Bullis Gap Road, an unmarked, unpaved, nearly impassable stretch of road whose northern end is rarely used even by its own residents driving pick-up trucks and four-wheel drive vehicles. In this respect the facts in the case at bar are considerably more favorable to the Government than they were in two recent cases in which we upheld investigative stops on Highway 118 and Highway 385, respectively. United States v. Villarreal, supra; United States v. Almand, 5 Cir., 1978, 565 F.2d 927, cert. denied, ____ U.S. ____, 99 S.Ct. 92, 58 L.Ed.2d 116 (1978).

The record establishes that, except during hunting season, Bullis Gap Road receives little use and its northern three-quarters almost none.



The record further demonstrates that, due to the rugged and difficult terrain, those who do drive on the road generally use pick-up trucks or vehicles with four-wheel drive. Thus, however sparse the total traffic on the road, the number of ordinary passenger cars is even less. The families living along the road are known to each other and to the Border Patrol, as are their vehicles. Indeed, traffic is generally so meager that residents immediately notice the presence of outsiders. No signs or markings at the intersection of Highway 385 and Bullis Gap Road indicate that the road leads to Highway 90.

In light of these facts, the presence of passenger cars on Bullis Gap Road outside of hunting season is

inherently much more suspicious than the use of Highways 118 and 385 at odd hours of the day. This factor in conjunction with the other circumstances surrounding the stop of appellees' car careated reasonable suspicion sufficient to justify the stop. Officer Pagitt's friend, who had provided aid on prior occasions, reported that two cars were traveling north about 100 yards apart. However unusual one passenger car would be on Bullis Gap Road, the presence of two passenger cars, apparently traveling together and each with one occupant, was more unusual.

[3] We have had occasion in previous cases to consider the use of cars in tandem or in a "lead car-load car" arrangement during smuggling



operations. See, e.g., United States v. Resendez, 5 Cir., 1978, 578 F.2d 1041, 1044; United States v. Villarreal, supra, 565 F.2d at 936; United States v. Barnard, 5 Cir., 1977, 553 F.2d 389, 392; United States v. Escamilla, 5 Cir., 1977, 560 F.2d 1229, 1234. While this factor alone does not justify a stop, e.g., United States v. Barnard, supra, 553 F. 2d at 392; United States v. Escamilla, supra, 560 F.2d at 1234, it is nonetheless a circumstance that "may understandably raise the officer's suspicions." United States v. Barnard, supra, 553 F.2d at 392; United States v. Villarreal, supra. The officers could have inferred that there was some connection between the cars from the fact that two passenger cars were traveling

close together along a road rarely used by any passenger cars. Although only the light blue car appeared at the north end of Bullis Gap Road, Pagitt, knowing the condition of the road, could reasonably have suspected that the other car had suffered a mishap en route. As discovered later, the dark blue car had in fact become stuck in a stream bed.

There are other significant circumstances surrounding the stop of appellees' car that contribute to the reasonableness of Pagitt's suspicions. The road led away from the Mexican border in an area where there were eight unmanned ports of entry and numerous places where the river was easily fordable. See United States v. Brignoni-Ponce, supra, 422 U.S. at



884-85, 95 S.Ct. at 2582; United States v. Almand, supra; United States v. Villarreal, supra; United States v. Lujan-Miranda, 5 Cir., 1976, 535 F.2d 327. Although appellees' car was stopped roughly 95 miles from the Mexican border, the Border Patrol could properly have assumed that it came from the border area since the only point of access to the road's southern end is the intersection with Highway 385 which lies 30 miles north of the border. Compare United States v. Escamilla, supra. Highway 385 is a route known to be used for illegal aliens and smuggling, e.g., United States v. Villarreal, supra; United States v. Payne, 5 Cir. 1977, 555 F.2d 475, 478; United States v.Lujan-Miranda, supra, and the Border Patrol had information that Bullis Gap

Road was being used to evade the checkpoint on Highway 385 south of Marathon. E.g., United States v. Brignoni-Ponce, supra; United States v. Sarduy, 5 Cir. 1979, 590 F.2d 1355, 1357-58.

[4] The Border Patrol officers were entitled to evaluate these circumstances in the light of their experience and to draw reasonable inferences therefrom. United States v. Brignoni-Ponce, supra; 422 U.S. at 885, 95 S.Ct. at 2582; United States v. Villarreal, supra, 565 F.2d at 936 n.4. We conclude that the totality of the circumstances in this case, taken in the aggregate, was sufficient to create reasonable suspicion to justify an investigative stop.

B. THE SEARCH

Having decided that Officer



Pagitt's decision to stop appellees' car was supported by reasonable suspicion, we now consider whether the subsequent search of the car's trunk was warranted either by consent or probable cause. See United States v. Brignoni-Ponce, supra, 422 U.S. at 882, 95 S.Ct. at 2580.

1. CONSENT

[5] It is well established that a party can waive his rights under the Fourth Amendment and consent to a search provided, of course, that the consent represents an "essentially free and unconstrained choise." United States v. Watson, 423 U.S. 411, 424, 96 S.Ct. 820, 828, 46 L.Ed.2d 598 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 225, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). See also United States v. Almand, supra, 565 F.2d at 930.

[6] In the instant case, unchallenged testimony at the suppression hearing established that Petty not only consented to the search but actually suggested that the officers break open his trunk in order to convince themselves that it was empty. The only reason that the search was conducted at the Sanderson Border Patrol Office rather than at the situs of the stop was that Pagitt did not want to do damage to Petty's trunk. Neither of appellees testified at the hearing. However, there was no evidence that Petty at anytime withdrew his consent or objected to going to Sanderson or to the removal of the back seat. When asked on cross-examination why he had not sought to procure a warrant to search the car Officer Pagitt replied



"We had received permission from Mr. Petty to open the trunk."

Our careful reading of the record has revealed no suggestion that Petty did not give his consent to the search or that his consent was the product of coercion, overt or subtle. Under these circumstances we are compelled to conclude that the search took place pursuant to a valid consent.

2. PROBABLE CAUSE

[7, 8] Even if Petty had not consented to the search, however, it was supported by probable cause and therefore lawful. An automobile's mobility is an exigent circumstance permitting a search without a warrant so long as there is probable cause. Arkansas v. Sanders, ____ U.S. _____, 99 S.Ct. 2586,

60 L.Ed. 2d ___ (1979); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

[9, 10] The test for probable cause is whether "'the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been [or is being] committed.'" United States v. Tuley, 5 Cir., 1977, 546 F.2d 1264, 1267, cert. denied, 434 U.S.837, 98 S.Ct. 128, 54 L.Ed.2d 99 (1977), quoting Stacey v. Emery, 97 U.S. 642, 645, 24 L.Ed. 1035 (1878). See also Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637 (1969); Brinegar v. United States, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1310-11, 93 L.Ed. 1879 (1948). In determin-



ing whether there is probable cause to believe a vehicle contains contraband, "we look to the totality of the circumstances and the inferences that flow therefrom." United States v. Clark, 5 Cir., 1977, 559 F.2d 420, 424, cert. denied, 434 U.S. 969, 98 S.Ct. 516, 54 L.Ed.2d 457 (1977).

In this case we find that, when coupled with the circumstances known prior to the stop, the information gleaned from Pagitt's conversation with Petty and observation of Petty's car provided probable cause to conduct a search. Petty confirmed that he and Nunez-Quintela had come from the area of Big Bend National Park and stated that they were going to Fort Stockton. This admission significantly heightened the unusual nature of Petty's presence

on Bullis Gap Road since, by turning off Highway 385, which leads directly to Fort Stockton, on to the road, he added at least 50 miles distance and considerable time to the trip. This supports the inference that Petty and Nunez-Quintela were trying to avoid the checkpoint at Marathon. Petty offered no explanation of his choice of this unpaved route over the shorter, paved road available to him, and the officers observed no camping equipment or other material that would tend to explain appellees' presence in such a desolate and remote area.

Petty denied having seen the dark blue car on the road. While it is possible that Pagitt's friend had seen a light blue car other than Petty's driving with a dark blue car, Pagitt could reasonably have concluded that



this was most unlikely given the paucity of traffic on the road. The more plausible explanation was that Petty had something to hide. The fact that an inflated spare tire, a jack, and a lug wrench, items ordinarily kept in the trunk, were on the car's back seat in plain view could arouse suspicion that something was hidden in the trunk. See United States v. Hosch, 5 Cir., 1978, 577 F.2d 936, 966. Petty's statement that he had no key to the trunk because he had borrowed the car from his wife could, under the circumstances, further support the inference that he was hiding something in the trunk.

The presence of a disconnected CB radio on the back seat and an operational CB radio in the front could lend support to the notion that Petty's

car had been traveling in tandem with another car and that the extra CB radio had come from the other car. Finally, appellees' demeanor added to the suspicious circumstances; Pagitt testified that Petty was "talking very rapidly,"[5] while Nunez-Quintela remained in the car "just sitting looking straight ahead."[6] Given the totality of the circumstances in this case, together with the reasonable inferences to be drawn therefrom, we conclude that the Border Patrol officers had probable cause to search the car.

Having found that the initial stop was based on reasonable suspicion and that the subsequent search was

5. Tr. p. 30.

6. Tr. p. 33.



justified both by Petty's consent and by probable cause, we reverse the grant of appellees' motion to suppress and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOF THE FIFTH CIRCUIT

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October Term, 19

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NO. 78-3276

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D. C. Docket No. P-78-CR-69

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JIMMY DELTON PETTY and
JOE MARTIN NUNEZ-QUINTELA,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

Before Wisdom, Ainsworth and Roney, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

ISSUED AS MANDATE: August 31, 1979

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

November 14, 1979

Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, LA. 70130

TO ALL PARTIES LISTED BELOW:

No. 78-3276 - U.S.A. v. JIMMY DELTON PETTY and JOE MARTIN NUNEZ-QUINTELA

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By s/Sally Hayward
Deputy Clerk

cc: Ms. LeRoy Morgan Jahn
Mr. Larry Barber, Jr.
Mr. Warren Heagy

Supreme Court, U. S.
FILED
MAR 26 1980

No. 79-1146

# In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES DELTON PETTY AND
JOE MARTIN NUNEZ-QUINTELA, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1146

JAMES DELTON PETTY AND
JOE MARTIN NUNEZ-QUINTELA, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the investigatory stop that led to the discovery of marijuana concealed in their automobile was not justified by an articulable reasonable suspicion.

Petitioners were indicted in the United States District Court for the Western District of Texas on a charge of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). After a hearing, the district court entered an order suppressing the marijuana (Pet. App. 43-48).[1] The court of appeals reversed (Pet. App. 49-85).

[1] The seizure followed a consensual search of the automobile and is not challenged in the petition. At issue is the investigatory stop that preceded the search.

1. On June 21, 1978, petitioners' passenger car was stopped by Border Patrol and Texas Department of Public Safety officers on Bullis Gap Road near its junction with Texas Highway 90. Bullis Gap Road is an unpaved public road approximately 60 miles long, located about 30 miles from the Mexican border. It runs northeast between Highway 90, a paved east-west road, and Highway 385, a paved north-south road that takes off just above the border. There is a Border Patrol checkpoint on Highway 385 approximately 27 miles north of its junction with Bullis Gap Road (Tr. 7-10).

Highway 90 can be reached by staying on 385. In fact, using Bullis Gap Road to reach Highway 90 takes about one hour longer than using Highway 385 (and passing through the checkpoint) (Tr. 14-15). On the stretch of Bullis Gap between the two paved highways, there are no intersections. Except during hunting season (November and December), the road is used almost exclusively by eight families who live on adjoining property (Tr. 10, 15-16).

Bullis Gap Road is rough and unmarked. There are no signs at its junction with Highway 385 indicating that it leads to Highway 90 (Tr. 12). Except for its first 14 miles, the road is poorly maintained and in places virtually impassable. Traversing canyons, rimrock, and a range of small mountains, the road has frequent low water crossings, chuckholes and sandbars. It has no bridges (Tr. 11, 14). Even the families who live along the road avoid its northern end and instead travel south to and along High-



way 385 in order to reach Highway 90 (Tr. 54). Passenger automobiles are rarely seen along the road since local residents use suburbans, pickup trucks and four-wheel-drive vehicles (Tr. 11, 58).

After learning that Bullis Gap Road was being used to circumvent the Highway 385 checkpoint,[2] a Border Patrol officer asked local residents to report to him strangers or suspicious vehicles on the road (Tr. 19). On the day of the investigatory stop involved here, a local resident informed the officer that two sedan-type automobiles, one light blue and one dark blue or black, were proceeding north along the road approximately one hundred yards apart, with one person visible in each vehicle (Tr. 20, 41). With the aid of Department of Public Safety officers, the Border Patrol officer set up an interception point just shy of the junction with Highway 90 (Tr. 21-23) and stopped a light blue automobile containing both petitioners (Tr. 26-27).[3] On the back seat were an inflated spare tire, jack, lug wrench and CB radio. Petitioner Petty said in response to a question that he did not have keys to the trunk. He further asserted that there was nothing in the trunk and in-

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[2] In the fiscal year preceding this stop, 302 illegal aliens were apprehended at the checkpoint (Tr. 18). There are eight unmanned ports of entry along the Mexican border in the vicinity of Highway 385, and innumerable places along the Rio Grande River where the border can be crossed. The river was fordable during the month of June (Tr. 17-18).

[3] A second automobile, dark blue in color, was subsequently found stuck in a low water crossing 20 miles to the south on Bullis Gap Road (Tr. 50-51).

vited the officers to break it open should they doubt him (Tr. 30-31). Instead, the automobile was driven to the Border Patrol office a short distance away on Highway 90 and its trunk entered through the back seat without damaging the lock (Tr. 32, 34). The trunk contained several sugar sacks full of marijuana (Tr. 34).

2. The district court found that the officers did not have "specific articulable facts" rendering their suspicions concerning the automobile "reasonable and well-founded" (Pet. App. 48). On that basis, the stop was held to be illegal and the marijuana was suppressed. The court of appeals, in reversing, found that the circumstances viewed as a whole justified an investigatory stop. These circumstances, as the court described them (Pet. App. 69-76), included the proximity of the beginning of the road to an area suitable for illegal border crossing; recent information that Bullis Gap Road was being used to evade the checkpoint on Highway 385; the fact that the terrain was suited only for pickup truck or four wheel drive vehicles, rarely traversed by strangers, and seldom used even by local residents; and the presence of two passenger automobiles traveling in tandem in a "lead-car-load car" arrangement.

3. Petitioners contend that the stop of their automobile was not grounded on reasonable suspicion and that the court below accordingly erred in reversing the district court's order suppressing the evidence gathered after the stop.



To begin with, this claim is premature. The ruling below places petitioners in the same position they would have occupied had the district court denied their motion to suppress in the first instance. Such an interlocutory order is not subject to pretrial appeal. See *United States* v. *MacDonald*, 435 U.S. 850, 853-863 (1978); *Cogen* v. *United States*, 278 U.S. 221, 222-224 (1929). The considerations that militate against interlocutory appeal of the denial of a motion to suppress also counsel against interlocutory review by this Court. If petitioners are acquitted at trial, their claim will be moot. If, on the other hand, they are convicted and their convictions affirmed, petitioners will then be in a position to present all of their contentions to this Court. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostoock R. Co.*, 389 U.S. 327, 328 (1967); see *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1916); see generally *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940).

At all events, the court of appeals correctly decided this case. In *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884-885 (1975), this Court articulated factors officers may consider in determining the existence of reasonable suspicion—"the characteristics of the area in which they encounter a vehicle[,] [i]ts proximity to the border, the usual patterns of traffic on the particular road * * * previous experience with alien traffic * * * recent illegal border crossings in the area * * * obvious attempts to evade officers * * * [a]spects of the vehicle itself." Viewed in terms of

any or all of these factors, the stop of petitioners' automobile was fully justified.

Petitioners argue (Pet. 25) that the officers' suspicion could not have been reasonable since it was formed, and a decision made to stop their automobile, well before the officers personally observed the vehicle making its way along Bullis Gap Road. However, the automobile had been observed by a local resident who, alerted by the Border Patrol, reported what he had seen. Personal observation by the officers would have added nothing to the information he supplied.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

MARCH 1980

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[4] Petitioner claims that there is a conflict between this case and *United States* v. *Cortez*, 595 F.2d 505 (9th Cir. 1979), petition for cert. pending, No. 79-404, which held that for suspicion of criminal activity to be reasonable it must be based at least in part on direct observation of inherently suspicious activity. In petitioning for a writ of certiorari in *Cortez* we suggested (Pet. 18) the appropriateness of summary reversal. We do not believe, however, that this case warrants further review regardless of the disposition of *Cortez*. Here, unlike *Cortez*, the Border Patrol focused on a particular automobile in advance of the stop, and did so not only because of the characteristics of Bullis Gap Road and the surrounding terrain, but also in part because petitioners' automobile was seen traveling in tandem with a second automobile in an arrangement common to smugglers. Moreover, as we noted above (page 5, *supra*), there is as yet no final judgment here appropriate for review.

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